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## Review article

# Constitution-making in the 21st century

Cheryl Saunders\*

Melbourne Law School, Melbourne,  
Australia

\*Email: [c.saunders@unimelb.edu.au](mailto:c.saunders@unimelb.edu.au)

**ABSTRACT**

Constitutions have been made or changed in major ways in more than half the countries of the world in recent decades. This article deals with contemporary approaches to constitution-making, organising the analysis around three key phases: setting the agenda, in terms of both substance and process; design, drafting and approval; and implementation. It argues that, while all constitution-making processes are different, there are some distinctive features of constitution-making in the 21st century that include popular participation, the need to build trust, internationalisation in its various forms and the importance of process. The article canvasses examples of constitution-making practices that have been or are likely to be influential. It identifies and briefly explores some of the key tensions in constitution-making between, for example, international involvement and domestic ownership of a Constitution and public participation and leadership.

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## INTRODUCTION

Any human society has a set of rules or practices of some kind that governs the relations between its members and the ways in which they make decisions affecting the group as a whole. Historically, in many societies, such rules may have been customary and organic. But the idea of a Constitution that took hold from the late 18th century, following the adoption of written constitutions in the United States and France, had significant additional features. The primary constitutional rules took written form, typically in a single document called a 'Constitution'. These rules became supreme or fundamental law, overriding all other law and government action. The Constitution both empowered and limited institutions of government. Over the course of the latter part of 20th century, this became the conception of a Constitution that now prevails throughout the world, with only a very few, *sui generis*, exceptions.<sup>1</sup>

This understanding of a Constitution presents the issue of legitimacy in a new guise. It raises the important question of the conditions under which a community and its leaders from time to time will accept that certain rules have 'constitutional' status, so that they override all others and limit what can be done in the exercise of public power, not only now or next year, but over what might be a long period of time. The answer may depend on a range of factors: the authority for the Constitution; the process by which it was made; its substantive content; its effectiveness; whether or not legal continuity with the previous constitution has been maintained. The relevance of each of these factors, the weight given, respectively, to them and the way in which they apply may vary between countries, constitutional traditions and over time. Once, for example, it was accepted that Imperial authorities could legitimately put Constitutions in place for their colonies, at least as a matter of law, because they represented the 'sovereign' power.<sup>2</sup> Those times have long since gone.

A very large number of Constitutions have been made across all regions of the world since the fall of the Berlin Wall just over 20 years ago. At least 100 new Constitutions were put in place over this period, generating a wealth of comparative constitutional experience.<sup>3</sup> Much of this was the consequence of regime change (central and eastern Europe; South Africa; Indonesia) although some were also associated with the creation of new states (Timor Leste, Montenegro) or were the product of particular local factors (Bhutan, Hungary, Myanmar). And this creative constitutional phase is not over yet. Constitution-making processes are presently underway in, for example, Nepal, Southern Sudan, Iceland and Fiji. A new wave of constitution-making has recently been kick-started by successive popular uprisings in Arab states: Morocco, Tunisia, Egypt, Jordan and Libya.

As contemporary constitution-making evolved in the latter part of the 20th century it assumed some distinctive features, which became even more pronounced in the early 21st century.

First, there is now, effectively, universal acceptance that the authority for a Constitution must derive, in one way or another, from the people of the state concerned.<sup>4</sup> This idea is not, of course, new, but it has been reinforced by the aspirations of people everywhere in the aftermath of the overthrow of authoritarian regimes. Moreover it now has a practical as well as theoretical dimension. People now expect actually to be involved in the constitution-making process and not just symbolically associated with it; a point to which I will return.

Secondly, most Constitutions are now made for multi-cultural societies, some of which are, or have been, in conflict.<sup>5</sup> This is a change from earlier times when it was assumed, rightly or wrongly, that a Constitution was made for a people with a common history, religion and language to whom, however fancifully, a common will might be attributed. These new conditions place much greater expectations on Constitutions: to build the nation as well as the state; to provide at least some of the missing

<sup>1</sup>The United Kingdom is the most obvious and clear-cut example of these. See for example the foreword to the *Cabinet Manual* (1st edition: October 2011) by Prime Minister Cameron: "This country has a rich constitution developed through history and practice, and the Cabinet Manual is invaluable in recording this...", <http://www.cabinetoffice.gov.uk/sites/default/files/resources/cabinet-manual.pdf>.

<sup>2</sup>Australia is an unusual case in point, where the current Constitution was enacted by the then Imperial power but now typically is attributed to the sovereignty of the Australian people, in fully independent Australia: Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis*, (Hart Publishing, 2011), 59-64.

<sup>3</sup>For a useful, recent, calculation of the breakdown of new Constitutions made over recent decades see International IDEA, *Constitution Building After Conflict*, Policy Paper, May 2011, 9.

<sup>4</sup>From a huge literature see, for example, the Commonwealth Human Rights Initiative, 'Promoting a Culture of Constitutionalism and Democracy in Commonwealth Africa', Recommendations to Commonwealth Heads of Government, 1999.

<sup>5</sup>Again, from a large literature, see Sujit Choudhry (ed), *Constitutional Design for Divided Societies* (Oxford: OUP, 2010).

cohesion; to protect minorities against decisions of the majority that are not compatible with peaceful and mutually fulfilling co-existence.<sup>6</sup> To fulfill these expectations, the Constitution-making process must not only be inclusive, but must also engender trust, between segments of the community, between their leaders and between leaders and the people. The deeper the divisions in society the more important trust is likely to be and the more challenging it will be to achieve.

A third, marked characteristic of constitution-making in the 21st century is the involvement of the international community, or segments of it, in what traditionally has been regarded as primarily, if not exclusively, the business of a state and its people.<sup>7</sup> International involvement is most intense where a constitution-making process is preceded by some form of conflict, attracting the peace-making offices of the UN or other states, which in turn have the potential to spill over into constitutional process or design.<sup>8</sup> Even leaving these extraordinary—although not uncommon—cases aside, however, international law now impinges on constitution-making in a variety of other ways. International human rights norms increasingly are incorporated into Constitutions, either by reference or in transcribed form.<sup>9</sup> And an argument is gathering strength that public participation in constitution-making is not only a sensible national strategy but also a right under international law.<sup>10</sup> The obvious tension here between international standards and local constitutional ownership is eased somewhat by the reality that local populations typically expect their own Constitutions to comply with international norms of this kind.

Segments of the international community also are involved in constitution-making in a range of other ways through, for example, the provision of constitutional advisers by NGOs and under foreign aid programs. There is a tension here as well, between the international involvement and local ownership, which is less readily resolved. Foreign advisers bring valuable expertise, by way of knowledge about options for constitutional process and how similar problems for substantive constitutional design have been handled elsewhere. They do not necessarily understand the context of the host country, however or appreciate the significance of particular features of the local context for the process by which the Constitution is made and for decisions about constitutional design. Their loyalties may also be divided, between the needs of the host jurisdiction and the expectations of a donor state. The solution lies in the use of experts with comparative insights and in crafting a role for experts that makes their knowledge and skills available in a form that is as helpful as possible without pre-empting either local direction or choice. There is a growing awareness of the need for this balance to be struck and some progress has been made towards doing so, although there is still a long way to go.<sup>11</sup>

One final characteristic of constitution-making in the 21st century is the emphasis on process as opposed to the content of the Constitution or, in other words, on the way in which the Constitution is developed as opposed to what it contains at a particular point in time.<sup>12</sup> Process has always been important, in the sense that both the role and status of a Constitution mean that it should be made in a way that differs, preferably significantly, from the ordinary law-making process. The significance of process is now further enhanced, however, by the contemporary focus on public participation in constitution-making and the need to build trust. Getting these right increasingly is seen as a key to a Constitution that is effective and lasting. Process can underpin the legitimacy of a Constitution, increase public knowledge of it, instill a sense of public ownership and create an expectation that the Constitution will be observed, in spirit as well as form. A constitution-making process may assist to set the tone for ordinary politics, including the peaceful transfer of power in accordance with constitutional rules.

<sup>6</sup>Armin von Bogdandy et al, 'State-Building, Nation-Building, and Constitutional Politics in Post-Conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches' in A. Von Bogdandy and R. Wolfrum (eds), 9 *Max Planck Yearbook of United Nations Law*, 279 (2005).

<sup>7</sup>One recent article, however, offers a timely reminder that constitution-making has always had 'a built-in international dimension'; not least because of the need for acceptance of an emerging state by the international community: Chaihark Hahm and Sung Ho Kim, 'To make "We the People": Constitutional Founding in Postwar Japan and South Korea', 8 *International Journal of Constitutional Law*, 800, 810 (2010).

<sup>8</sup>Simon Chesterman, *You the People: The United Nations, Transitional Administration, and State Building* (Oxford: OUP, 2004).

<sup>9</sup>Tom Ginsburg, Svitlana Chernykh, Zachary Elkins, 'Commitment and Diffusion: How and Why Constitutions Incorporate International Law', 1 *Illinois Law Review* 201, 208–209 (2008).

<sup>10</sup>Vivian Hart, 'Democratic Constitution Making', USIP Special Report 107, July 2003.

<sup>11</sup>For one contribution, see International IDEA, *Constitution Building After Conflict*, op.cit.

<sup>12</sup>Hart, op.cit.

The remaining sections of this article are built around the stages of a 21st century constitution-making process. I distinguish three in particular: the period during which a range of critical preliminary decisions about a constitution-making exercise are made, described below in terms of setting an 'agenda'; the various processes for design, drafting, agreement and approval; and the final but important phase of constitutional implementation. No process is the same and each varies with the local conditions at the time constitution-making is undertaken: the circumstances that led to the demand or need for a new Constitution; the configuration and distribution of power; the implications of geography, demography and socio-economic factors for the logistics of a constitution-making exercise. Nevertheless, all constitution-making processes go through these general stages, whether they are acknowledged or not. In relation to each of the three principal stages, I will continue to trace some of the themes that have been identified already, including legitimacy, trust, public participation and the complex mix of local and international forces.

## AGENDA SETTING

### Concept

In any constitution-making exercise there is a stage before it gets much publicity, when the agenda effectively is set. The idea of an 'agenda' for this purpose includes the process itself, the decision about whether to make a new Constitution or to amend the existing one and, in either event, the parameters of the new constitutional dispensation.

In terms of the process, decisions likely to be made at this stage include the nature of the constitution-making body, whether new elections are required and, if so, when, the electoral rules that should apply in this case, how the state is to be governed during the constitution-making period, procedures for approval and ratification of the final draft Constitution and strategies for public participation. Not all of these considerations are relevant for every process; where the existing Constitution is to be amended, for example, the incumbent government and legislature may well continue in office at least until the changes are made, so that there is no need to provide transitional governing arrangements during this period. Ideally, the entire process constitution-making process should be prescribed in advance, together with appropriate and realistic timelines. Because it is impossible to predict all the contingencies that may arise, however, this road map should have a degree of inbuilt flexibility that enables adjustments to be made to overcome expected flexibility.<sup>13</sup> There is advantage in making advance provision for the resolution of deadlocks as well.<sup>14</sup>

This is the stage also at which a decision must be made whether to maintain legal continuity with the previous constitution. A decision in favour of continuity effectively determines how the new constitutional arrangements will be brought into effect as law. A decision against continuity leaves this question open. Many, although by no means all constitution-making processes seek continuity. In some cases, however, a decision is made to return to an earlier Constitution as in Indonesia in 1959<sup>15</sup>; a similar course was considered in Thailand after the election of the Yingluck government in 2011, although this was subsequently overtaken by a proposal to amend the existing constitution.<sup>16</sup> In other constitution-making exercises the new Constitution is intended to stand alone, as a fresh expression of popular will that is revolutionary, at least in legal terms.<sup>17</sup>

Continuity is relevant to legitimacy but not essential, as long as legitimacy can be secured in other ways. A decision to make a new Constitution in a way not prescribed by the previous Constitution thus makes the design of an alternative constitution-making process all the more important. I note in passing that a decision against legal continuity does not affect the question of whether the previous

<sup>13</sup>Too much flexibility is undesirable, however, and may undermine respect for constitutional processes. The repeated extensions of the term of the Constituent Assembly in Nepal, justified for a time by reliance on the doctrine of necessity, is a case in point: see analysis by Bipin Adhikari, 'The doctrine of necessity is vulnerable on any ground', <http://constituent-assembly.blogspot.com.au/>.

<sup>14</sup>For a comprehensive overview of many of these issues see Michele Brandt, Jill Cottrell, Yash Ghai and Anthony Regan, *Constitution Making and Reform: Options for the Process*, (Interpeace, 2011).

<sup>15</sup>Denny Indrayana, *Indonesian Constitutional Reform 1999–2002* (Kompas, 2002), 6–10; see also Adnan Buyung Nasution, *The Aspiration for Constitutional Government in Indonesia*, (Pustaka Sinar Harapan, 1992).

<sup>16</sup>'Poll: Majority for Return of 1997 Charter', *Bangkok Post*, 11 December 2011, 'Pheu Thai stands by CDA Plan', *Bankok Post*, 11 January 2012.

<sup>17</sup>Colombia became a case in point in the course of the constitution-making process: Donald T. Fox, Gustavo Gallon-Giraldo and Anne Stetson, 'Lessons of the Colombian Constitutional Reform of 1991' in Laurel E. Miller (ed), *Framing the State in Times of Transition*, (USIP Press, 2010), 467.

Constitution is used as a de facto model, in whole or in part. Most new Constitutions build on familiar principles and institutions, even where they are ostensibly making a fresh start.

Finally, the agenda setting phase also determines the ambit of change even when, as sometimes is the case, ultimately no limits are prescribed. If for example, it is decided to introduce new constitutional arrangements through amendments to the existing Constitution, there is likely to be an early indication of the areas in which change is sought or, conversely, of the parts of the Constitution that must be preserved. Even in the case of a process to establish a completely new Constitution the essentials of the new arrangements may be prescribed in advance: democracy, republicanism, parliamentary or presidential, the form of electoral system; and so on. There is a link between limits of this kind and the design of the constitution-making body itself. The more legitimate the constitution-making body in its own right, the greater its potential to depart from its terms of reference as long as, ultimately, it is confident of securing final approval for the Constitution.<sup>18</sup> The decision of the Philadelphia Convention in 1789 to ignore its mandate by drawing up a new Constitution for the United States is merely the most famous example of this kind.<sup>19</sup>

### Method

As the first agenda setting phase of the constitution-making process has a relatively low profile, there is danger that important decisions will be made by default, without adequate reflection or consultation. Most obviously, where a country is emerging from conflict, all or parts of the constitutional agenda may effectively be set in the course of the peace process, in a way that has the advantage of bringing the conflict to an end, but that also has unsatisfactory consequences for the Constitution in the longer term. The Constitution for Bosnia-Herzegovina, which was literally prescribed by the Dayton Peace Accords, is the most high-profile case in point.<sup>20</sup> The guarantees to the Bosniac, Serb and Croat communities that finally brought the conflict to an end entrenched a constitutional model with weak and fractured central institutions, built on ethnic lines, which so far has proved impervious to change.<sup>21</sup> Even in less dramatic circumstances, however, decisions about all or parts of the constitution-making agenda may be made inadvertently or without adequate planning or consultation. And yet this is a critical period, at which choices can effectively determine the success or failure of a constitution-making process. This is also the point at which it is important to lay the foundations of trust between key stakeholders.

The significance of this phase can be illustrated by the example of South Africa, as it moved to create a new, non-racial Constitution following the collapse of apartheid.<sup>22</sup> There was deep mistrust between the principal political groupings, as a legacy of the long history of apartheid. Violent acts had been committed on all sides. There was potential for even more violence unless a mutually satisfactory solution was reached. And the interests and goals of the principal players were diametrically opposed. This is evident even if attention is confined to the position of the two major parties. The incumbent National Party government controlled the existing Parliament, which had been elected on a racial franchise. It also controlled the other institutions of the state, including the police, the military and the broadcasting service. It was clear that it would lose power to the disenfranchised majority once non-racial elections were held. And it was apprehensive of the Constitution that would be put in place, once control over the organs of state power changed.

The African National Congress, on the other hand, was confident of easily winning the elections once a non-racial franchise was introduced. For that, however, constitutional change was needed, if legal continuity was to be preserved. And it was not prepared to accept that the new Constitution could be put in place by a Parliament elected on the apartheid franchise that in its eyes, not

<sup>18</sup>The example of Colombia, cited earlier, illustrates this phenomenon. So too does Benin: see Pearl T. Robinson, 'The National Conference Phenomenon in Francophone Africa', 36 *Comparative Studies in Society and History*, (1994), 575.

<sup>19</sup>Gordon S. Wood, *The Creation of the American Republic*, (WW Norton and Co, 1969), ch. XII.

<sup>20</sup>General Framework Agreement for Peace in Bosnia and Herzegovina. The Constitution of Bosnia and Herzegovina is attached as Annex 4.

<sup>21</sup>For an analysis of the Constitution shortly after it came into effect, see Sienho Yee, 'The New Constitution of Bosnia and Herzegovina', 7 *European Journal of International Law* (1996), 176. The dynamics of proposals for constitutional change are examined in Florian Bieber, 'Constitutional Reform in Bosnia and Herzegovina: Preparing for EU Accession', *Policy Brief*, (European Policy Centre, 2010).

<sup>22</sup>For a detailed analysis of the important South African example see Heinz Klug, 'Constitution-making, democracy and the 'civilizing' of Irreconcilable conflict: What might we learn from the South African Miracle?' 25 *Wisconsin International Law Journal* 269 (2007).

surprisingly, lacked legitimacy for the purpose. Nor was it prepared to allow the National Party to control other key institutions of the state while the elections and the constitution-making process were underway. While it could have seized power by force and made a Constitution unilaterally this would have precipitated a bloodbath, which was in no-one's interest.

The eventual solution provides a textbook example of bringing stakeholders together during the agenda setting phase to agree on both a process and constitutional outcomes with which all parties could live. At the risk of oversimplifying a highly complex and fraught process the key steps were these. A multi-party negotiating forum (MPNF) agreed on 34 principles with which the final Constitution was required to comply. These included, for example, a democratic system of government based on equality and non-discrimination; separation of powers; judicial independence; proportional representation; freedom of information; and the protection of linguistic and cultural diversity. The 34 principles were enshrined in an interim Constitution, which was written by the MPNF but formally enacted by the white majority Parliament.<sup>23</sup> The Interim Constitution thus created continuity with the previous Constitution, which stemmed from the apartheid era, without jeopardising the legitimacy of the final Constitution that was still to come. The Interim Constitution also provided for the election of a new Parliament on the basis of a non-racial electoral system; set out a process by which this Parliament, doubling as a Constitutional Assembly would draw up and approve the final Constitution; and provided arrangements for power-sharing in government during this period. In addition, to give security to all parties that the constitutional principles would be observed, the Interim Constitution required the final Constitution to be certified as compliant with the principles by a new, independent Constitutional Court.<sup>24</sup>

This process, broadly, worked and the South African example still is much admired. The finite details are peculiar to the South African context and are unlikely to be possible to replicate elsewhere. At a more general level, however, the South African case is highly instructive. The South Africans were able to establish a sufficient level of trust between stakeholders to facilitate agreement on the parameters for a new, democratic Constitution and on the relatively open and participatory process by which it would be made. In doing so, they drew attention to the usefulness of the device of an interim Constitution to solve the problem of transition from a government with contested legitimacy to a new governing regime that draws its authority from a new Constitution, the legitimacy of which is beyond doubt.

Public participation is most difficult during this first phase of a constitution building process. Typically, this stage is less formal and transparent. Negotiations between stakeholders may need to be confidential to be effective. On the other hand, public participation may be necessary to gain public acceptance of the legitimacy of the process and to inform decisions about critical features of the new Constitution. This was somewhat less important in South Africa, where the MPNF was broadly inclusive and the two major parties were confident that they were speaking for their members. Nevertheless, this is one aspect of the South African process that was open to criticism. Under less favourable conditions, of which Fiji is an example, as it emerges from military rule, public participation in an appropriate form is likely to be even more important during the agenda setting phase.

## DESIGN AND APPROVAL

The second phase of a 21st century constitution-making process is more familiar. This is the stage during which a draft of the Constitution is developed and becomes law. Exactly what this involves depends on the mechanisms used; an issue that is taken up below. As a generalization, however, it requires policy decisions about the content of the Constitution, a drafting process to give these decisions legal form, agreement on the draft as a whole and a procedure for bringing the Constitution into effect as fundamental law. Various different mechanisms are available for this purpose, alone or in combination with each other.<sup>25</sup> Three of the most common are as follows. The first is an advisory body of some kind, constituted by experts or representatives or both.<sup>26</sup> The second is an elected

<sup>23</sup>Constitution of the Republic of South Africa, Act 200 of 1993 (Interim Constitution). The key provisions dealing with the Constitutional Principles were s.71 and schedule 4.

<sup>24</sup>This duly occurred: see *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996(4)SA 744 (CC).

<sup>25</sup>A table setting out the institutions used in 19 relatively recent cases of constitution-making can be found in Laurel E. Miller, *op.cit.*, 607–610. See also Brandt, Cottrell, Ghai and Regan, *op.cit.*, Part 3. As both sources show, a combination of these basic mechanisms increasingly is the norm.

<sup>26</sup>The three-person Constitutional Commission of Fiji, appointed in 1995, offers one example.

body, which may be either a regular legislature or a specially constituted Constitutional Assembly.<sup>27</sup> The third is a referendum.<sup>28</sup>

Each of these mechanisms has strengths and weaknesses. Typically, an advisory body has expertise; in some cases, it may also be broadly representative. But it is unlikely to have the legitimacy to bring the Constitution into effect as law. It is always, therefore, combined with another process that is accepted as having authority to make a Constitution law, usually because participants are elected in some way. In this case, however, it is necessary to pay attention to the relationship between the advisory and elected body, to minimise divisions and misunderstandings that might jeopardise the success of the constitution-making project.<sup>29</sup> An elected body may have legitimacy in its own right to approve and enact the Constitution. But paradoxically, it may not always be sufficiently representative for constitution-making, if its composition relies solely on the ordinary electoral process, drawing on established parties. If the elected body is a regular legislature, moreover, it may prove difficult to rise above ordinary politics; while if it is a Constituent Assembly, there may be a question about its relationship to the legislature.<sup>30</sup> Finally, a referendum is not a stand-alone mechanism, but relies on some other process to design and draft the Constitution and to approve the version that is submitted to referendum. In theory, ratification by referendum confers a high degree of legitimacy. But a referendum is also a blunt instrument, seeking only approval or rejection. The quality of the Constitution depends on the earlier process, whatever it is. There is a high risk that a referendum outcome will be manipulated by political forces or that votes will be cast by reference to issues that have nothing much to do with the draft Constitution but are instead, for example, a response to populist politics. In any event, a referendum must be coupled with a very effective public information campaign if the outcome is to have a chance of reflecting actual public opinion about the new Constitution.

The arrangements for design and approval of a new Constitution should be chosen with its legitimacy and effectiveness in mind. In practice, the final choice is likely also to be influenced by a combination of constitutional tradition and conditions on the ground. Is there an existing legislature that is suitable for the purposes of making and approving a new Constitution? Does the state have a tradition of resorting to the constituent power as authority for a new constitution from time to time or is constitutional continuity the norm? Are there groups who should be included in constitutional deliberations but who would be unlikely to succeed in an ordinary electoral contest? These and similar considerations help to explain the very different deliberative processes adopted around the world in relatively recent times in, for example, Timor Leste, Kenya, Benin, Indonesia, Colombia and Nepal.

Important though these choices are, it is also necessary in each case to pay attention to a host of lesser but important details that may tip the balance between failure and success. Most constitution-making bodies assign initial responsibility for parts of the new Constitution to a series of committees. Thus, for example, the Constitutional Assembly of South Africa established six 'theme' committees, dealing respectively with the character of the democratic state,<sup>31</sup> the structure of government, the relationship between levels of government, fundamental rights, the judiciary and legal systems, and specialised structures of government.<sup>32</sup> While this is a suitable categorisation for South Africa, it may not necessarily suit states with different problems and priorities, which must design their own procedures to meet their own needs. Whatever categorisation is chosen, it is

<sup>27</sup>Spain offers a relatively clear example of reliance on a legislature; Timor Leste is an example of election of a Constituent Assembly. The distinction often becomes blurred, however. For example (as in Timor Leste) a Constituent Assembly sometimes transforms becomes the first legislature once the Constitution is made; in other states, of which South Africa is an example, the legislature constitutes itself as a specialised constitution-making body at specific times.

<sup>28</sup>European Commission for Democracy through Law (Venice Commission) *Code of Good Practice on Referendums*, adopted by the Commission at its 70th meeting, March 2007, [http://www.venice.coe.int/docs/2007/CDL-AD\(2007\)008-e.pdf](http://www.venice.coe.int/docs/2007/CDL-AD(2007)008-e.pdf).

<sup>29</sup>Arguably, this was a problem in Fiji: see the course of events described in Yash Ghai and Jill Cottrell, 'Between coups: Constitution Making in Fiji', in Laurel E. Miller (ed), op.cit., 275. It was also an issue in the much more complex Kenyan arrangements that led up to the failure of the referendum in 2005: the events are described in Alicia L. Bannon, 'Designing a Constitution-Drafting Process: Lessons from Kenya', 116 *Yale Law Journal*, 1826 (2007).

<sup>30</sup>This was an issue in Colombia, where the regular legislature ultimately was dissolved: Fox, Gallon-Giraldo and Stetson, op.cit., 474.

<sup>31</sup>This committee dealt with fundamental questions going to the character of the state including equality, democracy and constitutional supremacy: Constitutional Assembly, *Annual Report, May 1994–May 1995*.

<sup>32</sup>This committee subsequently was sub-divided into four, dealing with public administration, financial institutions and public enterprises, transformation and monitoring and the security apparatus: *Annual Report 1994–1995*, op.cit.

necessary to provide a process to effectively co-ordinate the decisions of the committees, in the interests of the coherence of the final constitutional draft. Amongst a host of other questions, the following are crucial considerations. What should be the timeframe for finalising the draft Constitution? How should deadlocks be resolved? Should super-majorities be required to approve the Constitution in an Assembly or by referendum, in recognition of the higher status of a Constitution? What should be the minimum prescribed turnout for a referendum, if one is held?

This is the phase also in which extensive public participation is widely expected and practised. Designing effective public participation in constitution-making is, however, rapidly becoming an art in itself. The days have long since passed when public participation took the form of public meetings addressed by political leaders or constitutional experts, seeking public approval for developed constitutional proposals. The public is now expected to be engaged actively during the formative stages of constitutional deliberation.<sup>33</sup> This requires a foundation of public information and education in a form that is helpful and reliable. It needs to be tailored to the needs of different segments of the public and made available through a wide range of media. Laying this foundation is not easy, because constitutional ideas are often so abstract.

Successive constitution-making exercises have learnt from each other, in this regard. The engagement of the public in South Africa, for example, was another much admired feature of this process, credited with attracting 2 million public submissions, although the actual number of independent submissions seems to have been considerably less. Many of the techniques used in South Africa to attract public interest and garner public participation are worthy of adoption elsewhere.<sup>34</sup> On the other hand, questions later were raised in South Africa about how effectively all the submissions had been taken into account. More recent processes have paid greater attention to this aspect of public participation.<sup>35</sup> Systems need to be designed to ensure submissions are collated, disseminated and analysed so as to ensure that contributions from the public make a difference to the Constitution that is not only symbolic but real.

There is continuing innovation in the design of deliberative constitution-making processes with extensive public participation. The high water mark so far is the very recent constitution-making process in Iceland, which followed the disastrous financial collapse in the country suffered in 2008.<sup>36</sup> The crisis gave rise to widespread dissatisfaction with the political system, as well as with Icelandic financial institutions, and to a movement for constitutional change. The body in Iceland with the legal authority to replace the Constitution is the Icelandic Parliament, or Althing.<sup>37</sup> As a prelude to action by the Parliament, however, an eye-catching and elaborate constitution-making process has been followed.<sup>38</sup> This began with a discussion about constitutional values, in a 'National Forum' involving more than 1000 delegates, randomly selected from the public. Following this brief, one day meeting a Constitutional Council was appointed, after an abortive electoral process,<sup>39</sup> to draw up a Constitution, which is likely to be submitted to referendum before enactment by the Althing. The Council used the technique of 'crowdsourcing' to engage with the public about the constitutional draft, using all forms of social media including Facebook, Twitter, YouTube and Flickr.<sup>40</sup> The fate of the draft Constitution at referendum and in the legislature will be determined over the course of 2012. Whatever the outcome, however, it is likely this will not be the last of crowdsourcing as a technique of constitution-making in the 21st century.

<sup>33</sup>For an early articulation of this position see Commonwealth Human Rights Initiative, *Promoting a Culture of Constitutionalism and Democracy in Commonwealth Africa*, Report to the Commonwealth Heads of Government, 1999.

<sup>34</sup>A good account of the techniques is found in Hassen Ebrahim, *The Soul of a Nation- Constitution-Making in South Africa* (OUP, 2000). Hassen Ebrahim was the Executive Director of the Constitutional Assembly.

<sup>35</sup>For a comprehensive account, see Brandt, Cottrell, Ghai and Regan, *op.cit.*, part 2.2.

<sup>36</sup>For an account of key events as the crisis unfolded, see 'Time-line: Key events since Icelandic crisis', *Financial Times*, 5 January 2010. For reaction and analysis see, for example, Andre Snaer Magnason, *Dreamland—Self-Help for a Frightened Nation*, (Citizen Press, 2008).

<sup>37</sup>Constitution of the Republic of Iceland, Article 79.

<sup>38</sup>For one, accessible, description see Richard Bater, 'Hope from below- composing the commons in Iceland', *Open Democracy*, 1 December 2011, <http://www.opendemocracy.net/richard-bater/hope-from-below-composing-commons-in-iceland>.

<sup>39</sup>This part of the process was messy. The election itself was invalidated by the Supreme Court; the victors were nevertheless appointed to the Constitutional Council by the government: Bater, *op.cit.*

<sup>40</sup>*Ibid.* See also the website of the Constitutional Council itself: <http://stjornlagarad.is/english/>.



## IMPLEMENTATION

The final phase of a constitution-making process is implementation. This phase extends for an indefinite period from the time the Constitution is passed. For obvious reasons, it is most intense in the first few years. The immediate target of implementation is the wide range of action that needs to be taken to give any Constitution effect. All manner of laws must be passed including, for example, electoral laws and laws to give detailed effect to aspects of a bill of rights. Constitutional institutions such as Human Rights Commissions must be established, generally also by law. Judicial and other appointments must be made. The first legislature must be elected and its committees constituted. And so the list goes on. Less obvious, no less important but undoubtedly even more difficult is the need to establish a constitutional culture in which constitutional mandates are understood, and both the letter and the spirit of the Constitution are observed, by those who have the responsibility for exercising public power: members of the executive branch, legislatures, courts and both the civil and security services.

Until relatively recently this stage of constitution-making attracted little attention. Once a Constitution became law national euphoria died quickly, the international community lost interest and implementation was left to the ordinary political process. This has now changed, as experience with the operation of new Constitutions in practice has drawn attention to the significance of the implementation phase. Implementation is now regularly taken into account in designing a constitution-making process, to try to encourage vigilance after the Constitution takes effect. In one recent spectacular example, in Kenya, the demands of implementation are anticipated in the Constitution itself. Schedules to the Constitution identify the legislation that needs to be passed, prescribe both timelines for doing so and sanctions for failure and stipulate the creation of a Constitution Implementation Commission (CIC), together with a parliamentary oversight body.<sup>41</sup> Interestingly, the CIC is also charged with the responsibility of involving the public in the implementation process.

The new focus on implementation is timely and necessary. It remains to be seen, however, how effective formal implementation arrangements of this kind prove to be. The Kenyan approach has undoubtedly been useful; many laws required by the new Constitution have been enacted and other constitutional projects have been given effect based on these mandates, including initiatives designed to enhance the effectiveness and independence of the judiciary.<sup>42</sup> On the other hand, there is criticism of the adequacy of implementation, on a range of fronts, including the quality of the laws that have been enacted, patchy implementation of constitutional initiatives including, for example, security sector reform and the lack of progress in gender equality.<sup>43</sup> In the end, a Constitution must attract natural support, from those engaged in public life, from civil society and from the public at large. And so we return to the themes with which I began, the importance of legitimacy and trust.

## CONCLUSION

I make three broad observations by way of conclusion.

First, constitution-making has changed significantly over recent decades and is continuing to do so. Thanks to the sheer volume of constitution-making, the world has learnt a great deal and there is now a considerable body of practical experience. As a generalisation, the trend is towards openness, inclusivity and the active involvement of the people of a state at all stages of the process through participation, rather than mere consultation. This is a complex trend, however. Leadership and vision are necessary too. Constitution building needs to produce a workable result. In the end, the goal is to design a process that is worthy of a task as significant as that of making a Constitution by which people will be governed, which will be recognised as legitimate and respected and observed by those to whom it applies.

Secondly, an ambiguous relationship has emerged between national action and international norms in the sphere of constitution-making. Constitutions are inherently local instruments. They must respond to local needs and they must be 'owned' both by the people of the state concerned and by

<sup>41</sup>For an overview, see Angela Waki and Wathingira Gituro, 'The New Constitution of Kenya; The process of implementation', <http://www.coulsonharney.com/LawArticles/Documents/The%20New%20Constitution%20-%20Implementation.pdf>. For the formal framework, see the Commission for the Implementation of the Constitution, <http://www.cickenya.org/>.

<sup>42</sup>Andrews Atta-Asamoah and Nyambura Githaiga, 'Implementing Kenya's Constitution like shooting at a moving target', *Institute for Security Studies*, 30 September 2011, [http://www.iss.co.za/iss\\_today.php?ID=1363](http://www.iss.co.za/iss_today.php?ID=1363).

<sup>43</sup>Ibid.

their political leaders from time to time. It is hard to see how they can effectively perform their functions on any other basis. At the same time, however, there are international benchmarks for democracy and human rights which now have implications not only for the substance of constitutions but also for the processes by which they are made. Tension between localism and universalism is evident across the whole field of comparative constitutional law, attracting a great deal of attention from both practitioners and scholars. There is a wide diversity of views about where the current balance lies and there is no doubt that, in any event, it will continue to shift in response to these opposing pressures. For the purposes of constitution-making, however, the two can broadly be reconciled as national communities often armed with considerable knowledge about what is happening elsewhere, draw on international standards to measure the legitimacy of their own Constitutions and the ways in which they are made.

One final, obvious, lesson from the experiences to date of the 21st century is that making a Constitution is not easy and the outcome is never exactly what everyone—or, perhaps, anyone—wants. One of the reasons for the emphasis on process is to enable a satisfactory compromise to be reached between the competing interests and ideas that are features of modern communities. As a fallback, there are well-known instances, of which India, Ireland and Chile are examples, in which some problems have proved so intractable that they have deliberately been left unresolved in the interests of agreement on an otherwise satisfactory Constitution, with a view to finding a solution over time through constitutional evolution or formal change.<sup>44</sup> It does not seem desirable to embark on constitution-making with less than the best possible Constitution as a deliberate goal. Constitutional moments are too rare and too important to be wasted. But it may be useful to remember that techniques of this kind also have worked, in various parts of the world, when difficulties arise that, for the moment, prove intractable.

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<sup>44</sup>The experience of these three states is analysed from this perspective in Hanna Lerner, *Making Constitutions in Deeply Divided Societies*, (Cambridge University Press, 2011).